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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1124

BIGGS RENTAL COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Claims

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The Biggs Rental Company prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on 17 December 1965.

CITATION TO OPINIONS BELOW

The opinion of the Court of Claims is reported in ____ CtCl ....., and is printed in Appendix B hereto, below, p. 4.

JURISDICTION

Jurisdiciton of the Court of Claims was invoked under the Tucker Act, 28 USCA §1491, and 28 USCA §1346 (a)(2) since the amount claimed was over $10,000. The judgment of the Court of Claims was entered on 17 December 1965. [R 35] The jurisdiction of this Court is invoked under 28 USCA §1255(1).

QUESTION PRESENTED

Where government authorities, not under pressure of emergency, seize private property in connection with broadly worded Declarations of Taking and purport to accept title to such property, may they thereafter tender the property back to its owner and be relieved from the obligation to pay for it where the owner was not specifically named in the original Declaration of Taking?

STATUTES INVOLVED

The statutory provisions involved are the Tucker Act (28 USCA §1491), the Declaration of Taking Act (40 USCA §258a) and the compensation clause, US Constitution, Fifth Amendment, providing "... nor shall private property be taken for public use, without just compensation." The first two provisions are printed in Appendix A, below, pp. 1, 2.

STATEMENT[1]

Petitioner seeks compensation from the United States for property taken in connection with certain eminent domain proceedings (to which petitioner was not a party) occurring at Fort Ord, California in the fall of 1957.

From about 1950, two Wherry housing projects (500 units each) were owned and operated on land leased from the United States at Fort Ord by Likins-Foster Ord and Likins-Foster Monterey ("sponsor" corporations). [CF 2, 4] The two corporations were under common ownership and management, but were separately incorporated because the Wherry Act required a separate corporation for each Wherry project. [CF 2, 5, 7]. Wherry housing units were rented to military personnel, who paid rent out of their statutory quarters allowance. [CF 10]

At Fort Ord, military personnel would sometimes report from foreign assignments without the necessary furnishings for an unfurnished apartment. This caused much inconvenience in that available apartments could not be used for lack of furniture. After discussions with the Commanding General and others at Fort Ord, the Foster interests that controlled the sponsor corporations formed a third corporation, petitioner Biggs Rental Company. Thereafter, petitioner purchased apartment furnishings, television antennas and the like which were rented by petitioner to military personnel who had need of them. It was necessary to form petitioner only because of certain charter limitations which precluded the two sponsor corporations from renting furniture to tenants directly. [CF

[1] "CF" references are to numbered Findings of Fact in the decision of the Court of Claims, below, Appendix B.

6] All rental arrangements and rates used by petitioner were approved by the Army authorities at Fort Ord. [CF 9]

In the fall of 1957 there were thus three Foster-controlled corporations doing business in connection with Wherry housing at Fort Ord; petitioner and the two sponsor corporations. [CF 7] The three corporations were under common ownership, shared a common project office, and had the same employees. [CF 8] Rental contracts for furniture and television antennas were separate from housing rentals, but both were paid to the same personnel at the project office. [CF 9]

Early in 1957, the Chief of Engineers, United States Army, was given responsibility for acquiring the Wherry housing at Fort Ord for conversion to Capehart housing. Capehart housing differed from Wherry housing in that Capehart housing was Government owned and operated and was occupied on a rent-free basis by military personnel. Immediate responsibility for the acquisition at Fort Ord was delegated to the Real Estate Division of the San Francisco District Office, Corps of Engineers. [CF 11] In January 1957 letters were sent to the sponsor corporations (but not to petitioner Biggs) advising them of the Government's intentions and requesting negotiations. [CF 11]

Negotiations were brief and unsuccessful. [CF 12] Sometime prior to 1 November 1957, the Real Estate Division prepared a condemnation assembly which was forwarded eventually to the United States Attorney in San Francisco. [CF 14] The assembly contained no reference to Biggs, nor had the Real Estate Division included

Biggs in the prior negotiations. Indeed, although the Army authorities at Fort Ord were fully familiar with Biggs and its property, and approved all of its rental schedules, the Real Estate Division which had responsibility for the property acquisition knew nothing of the existence of Biggs or its property until after the condemnation complaint was filed. [CF 12, 18]

Thus, on 1 November 1957, the condemnation complaint was filed and named as defendants only the two sponsor corporations. Two Declarations of Taking were filed, and orders for immediate possession were obtained from the Court. Each declaration of taking called for possession of:

> "All right, title and interest of [the named sponsor corporation] arising out of [its lease of the Ford Ord land] together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcels [leased] and being the property of said corporation . . ." [CF 16(a), CF 14]

By 4:30 PM of the same day (1 November), the Army moved into possession of all property, including petitioner's, located at Fort Ord. [CF 14, 15, 16]

On the day before the complaint in condemnation was filed, the Billeting Officer at Fort Ord notified each tenant by letter that ". . . NO REPEAT NO rent be paid by occupants of Wherry Housing for the month of November until further notice." [CF 14] On the day before the takeover and on 1 November the Army authorities at Fort Ord stationed soldiers outside the project office to advise military tenants not to pay their November rent. [CF 15] Further preventing the collection of rentals by petitioner and by the sponsor corporations, the Army took over the project office on 1 November for its own operations,

emptied Mr. Foster's desk, and did not restore the office to use by the Foster interests until approximately 10 days later. This subsequent restoration of the project office was in connection with an inventory of various properties in Army custody. [CF 16(g), 20]

At the time of the Army takeover on 1 November, petitioner Biggs and the sponsor corporations owned substantial personal property at Fort Ord.

The sponsor corporations owned some 1,000 ranges and refrigerators and numerous window shades, all of which were covered by chattel mortgages. [CF 15] These items were for the most part installed in the housing units, although some were stored in a concrete warehouse and in a metal warehouse owned by the sponsor corporations. In addition, the sponsor corporations owned 9 motor vehicles, numerous items of equipment, office furniture, and spare parts, none of which were covered by the chattel mortgages. [CF 15] The coverage of the chattel mortgages is important because, as will be seen, the Government contended that it took only the personal property covered by the chattel mortgages. [CF 18, 19, 22]

Petitioner Biggs owned the following property at Fort Ord on 1 November 1957:

(1) 775 television antennas physically affixed to the housing units and having an agreed value of $19,375;

(2) One master television antenna system installed on public utility poles and having an agreed value of $37,820;

(3) Household furniture located in the housing units and also stored in the concrete warehouse owned by the sponsor corporations, having an agreed value of $11,576;

(4) Extra antennas, antenna poles and other equipment used with the television antennas, stored in the sponsor corporations' warehouses and having an agreed value of $537.66.

Immediately upon the filing of the condemnation complaint on 1 November, the 1000 housing units at Fort Ord became public quarters. The houses, the television antennas, the furniture, and everything else in the houses were used by the occupants on an entirely rent-free basis, without distinction between Biggs property and that of the sponsor corporations. [CF 15, 16(e), 23]

From the date of the takeover, the Army started to use maintenance equipment and spare parts belonging to the sponsor corporations. [CF 16(b)] Maintenance personnel employed in common by the sponsor corporations and petitioner were transferred to Army payroll for maintenance work. [CF 16(b)]

At first, the Army took spare parts without inventorying them. By the 4th or 5th of November, inventory procedures were established. [CF 16(b)] The sponsor corporations turned the keys to the warehouses over to the Army, retaining only the keys to the master television antenna system. The latter keys were also delivered to, and ultimately kept by, the Army. [CF 16(d)] On 1 or 2 November 1957, the Army placed its own padlocks on the warehouses. On 5 November, the Foster interests added new locks of their own. Thus, each warehouse wound up having two locks, only one of which could be opened by the Foster interests. In addition, the concrete warehouse was integrated into the Fort Ord guard (police) system. [CF 16(d)] Thus, from the first or second day of the

takeover, access to the warehouses was only possible upon obtaining the consent of Army authorities. [CF 16(d)]

On Monday 4 November, officers of petitioner and of the sponsor corporations met with Army officials and with "the only responsible representative of the Office of the District Army Engineer at Fort Ord", one John Murdock. [CF 17, CF 20 (last paragraph)] At the meeting, 3 different positions emerged. The Foster interests contended that all of the Wherry housing property, real and personal, was being taken, and they demanded a full inventory. Murdock took the position that only the real property and the property covered by the chattel mortgages was being taken. The Army stated that it wanted certain maintenance items from the warehouses, which were not covered by the chattel mortgages. The Army maintained, however, that "no personal property had been taken except the items described . . . in the chattel mortgages." [CF 17]

Even while the conference was going on, and throughout 4 November, the Army continued to take spare parts (not described in the chattel mortgages) from the warehouses and to use the Foster vehicles. [CF 17] At the same time, petitioner's property continued to be used by the occupants of the housing units. [CF 16(e), 17, 23]

On 5 November, Army officials "reversed their policy" [CF 17], stating that they would stop using the spare parts, but retaining the keys to the warehouses. [CF 17]

On 7 November 1957, Roy Lytle appeared for the sponsor corporations in the United States District Court to request a draw against the Government's deposit in the condemnation proceedings, and further made an oral

appearance on behalf of petitioner Biggs. An argument ensued in which Mr. Lytle asserted that the condemnation pleadings included all property of the sponsor corporations and of petitioner Biggs at Fort Ord. Counsel for the Government asserted that the only personal property being taken was that described in the chattel mortgages. This hearing was the first time that the Real Estate Division became aware of the existence of Biggs or that Biggs had property at Fort Ord. The arguments of the parties were taken under submission by the Court, which did not enter a ruling until 13 January 1960. [CF 18, 28]

The day following the Court appearance (on 8 November), principals of the parties met again. Each side repeated the position taken in Court the preceding day. [CF 19] Mr. Foster did offer to remove from consideration, however, the most costly item of Biggs property, namely the master television antenna system. His offer to disassemble and remove the system was refused, as he was told that it might be used for educational television by the Army. [CF 19] The Army had previously expressed interest in using the system, through communications from the Deputy Post Commander to the project superintendent on 4 November. [CF 17]

The meeting of 8 November resulted in a working agreement under which Murdock was to prepare inventories covering the disputed personal property of the sponsor corporations (i.e. property not covered by chattel mortgages) and the personal property of petitioner Biggs. [CF 19] The inventories were started on 11 November and were substantially completed (subject to minor corrections later) on 21 November. [CF 20, 22]

Upon completion of the inventories on 21 November, in the presence of Murdock and Murdock's staff, Foster dictated two letters covering the inventoried properties. One letter referred to the 9 motor vehicles of the sponsor corporations and acknowledged receipt of ownership certificates, keys, and of keys to the project rental offices. This letter was signed "Accepted by: John F. Murdock, Chief, Property Accounting Branch, San Francisco District," and Murdock apparently took the keys and certificates back to San Francisco with him. The second letter referred to all personal property of petitioner at Fort Ord (including by reference a detailed inventory attached to the letter), stated that "Possession of and title to the items on all lists were passed to the Army on the morning of 1 November 1957" and was also signed as "Accepted" by Mr. Murdock in his official capacity. [CF 20]

Following the meeting, Murdock delivered the two letters, the keys, and the ownership certificates to his superior, a Mr. Watkins. Further confirming his intention to "accept" the property, and presumably with the full knowledge of Watkins, Murdock executed a DD 290 form to transfer responsibility for the inventoried property to the Army at Fort Ord. [CF 22]

One week later, on 27 November, Watkins consulted with Foster, and did not in any way repudiate the Murdock letters of 21 November, or even refer to them. [CF 22] On the same day (27 November), however, Watkins did consult with his office attorney concerning the effect of the letters. Pursuant to this conference, Watkins was instructed to send to Likins-Foster duplicates of the

keys which Murdock had delivered from Foster. On 12 December, keys to the project rental office and to the warehouses were forwarded to Likins-Foster. [CF 22]

On 23 December, the automobile ownership certificates were mailed back to Foster. These were accompanied by a covering letter from Mr. Watkins which simply restated the Government's position in the matter pending before the United States District Court, namely, that the Government had taken only personal property covered by the chattel mortgages. This letter proved, in fact, to be erroneous, since the Court did decide, on 13 January 1960, that the Government had taken all of the personal property of the sponsor corporations, including the motor vehicles. [CF 28]

On 15 June 1960, the same Court (in a proceeding to which petitioner Biggs was not a party of record) determined only that the condemnations *pleadings* did not describe property of petitioner. This determination was limited to the face of the pleadings and did not purport to determine whether petitioner had a proper claim for compensation against the Government. [CF 28]

Sometime between 1 November and 15 December 1957, petitioner's property was removed from the housing units, its television antennas were taken down, and all property was placed in the warehouses. This property is still in possession of the Army at Fort Ord and nothing has been paid to petitioner for any of it. [CF 23, 26]

The Court of Claims (see Appendix B) held, on the above facts, that there had been no taking of petitioner's property, resting its opinion on the ground that the Government did not intend to take it.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law as to the power of Government authorities, not under pressure of emergency, to seize private property in connection with non-specific Declarations of Taking, to "accept" title to such property, and thereafter to refuse to compensate the owner for its value. Decision of the issues in this case will help to establish needed standards for the conduct of condemning agencies under the Declaration of Taking Act and will thereby give to private property owners a reasonable measure of security in dealing with such agencies.

In this context, the test used by the Court of Claims to determine the obligation of the Government to pay for the property (namely, whether the Government "intended" to take the property seized, as determined by a letter written some 53 days after the seizure) is one which has no sanction either in judicial precedent or constitutional law.

Indeed, the test used by the Court of Claims is in direct conflict with the test established by the same Court in the case of *Eyherabide v US* (1965) ____ CtCl ____, 345 F2 565, 567:

> "Federal law recognizes that, although there may be no *official* intention to acquire any property interest, certain governmental actions entail such an actual invasion of property rights that a constitutional taking must be implied [Citations]. The interference with use or possession may be so substantial and of such character that it cannot be done without compensation under the Federal Government's regulatory and executive powers." [Emphasis added.]

In the present case, petitioner's property in warehouses was placed under lock and key and surrounded by armed guards. Petitioner's customers were told by writing and by menace of soldiers present at the rental offices that no rent was to be paid. Petitioner's property in the housing units was used on a rent-free basis by the military occupants. The rental office itself was commandeered by the Army, its main desk emptied of its contents. The sole responsible representative of the taking authority, John Murdock of the Office of the District Army Engineer, signified his written acceptance of the property on 21 November 1957 and acknowledged that title and possession had passed to the Government some three weeks before. While the findings and the opinion of the Court of Claims equivocate on the subject, there is no question that "continuation of plaintiff's rental business probably would have been unprofitable because plaintiff no longer could utilize the office space, warehouse space, or employees of the Wherry corporations as it had done before the condemnation" (Opinion of Court of Claims, Appendix B, below, page 12).

Indeed, it appears that petitioner was not specifically named in the original Declarations of Taking because of the carelessness of the agency responsible for preparing the pleadings, an agency which did not even carry on enough preliminary investigation to find out that petitioner owned substantial property in and on the very buildings which the agency was seeking to condemn. As the evidence and the findings clearly show, the Army was fully familiar with petitioner and its property. The most casual inquiry to Army authorities concerning what the Army might

want would have disclosed the presence of petitioner. Even after the complaint was filed and after the United States Attorney had adopted an "official" position that none of petitioner's property was wanted, the Deputy Post Commander at Fort Ord (on 8 November) turned down petitioner's offer to remove the most costly item in this case, the master television antenna system, stating that the Army wanted to keep the system for use in educational television.

In connection with the Declarations of Taking filed by the Government in the main condemnation proceedings, it is abundantly clear that the Government utterly failed to meet the duty of specificity imposed on it by law. Thus, the cases arising under the Declaration of Taking Act (40 USCA §258a) require that the most "painstaking consideration" be given to the contents of such declarations.

> ". . . [T]he provisions of the declaration of taking should have had painstaking consideration.
>
> • • •
>
> In view of the language of the [Declaration of Taking Act], it was incumbent upon the government to designate expressly the interest less than fee simple title or the exceptions thereto by excluding the leasehold or fixtures and structures, if that were desired."
>
> *Burkhart v US* (CA9 1955) 227 F2 659, 661.

To the same effect, see *Bumpus v US* (CA10 1963) 325 F2 264, 266, where the Court stated:

> "Since the language of the reservation was written by representatives of the United States, it was incumbent upon the United States, since it chose to take less than the entire estate, to describe the estate

> to be taken with such exactness and certainty that the landowner would know what was reserved to him."

In the present case, the Declarations of Taking called for acquisition of, *inter alia*, "all * * * apparatus, fixtures and equipment" located on the property leased by the sponsor corporations from the Government. This description was surely broad enough to cover the property of petitioner and, as noted, it appears that petitioner was excluded from the formal documents because of the carelessness of the condemning agency.

The decision of the Court of Claims places heavy emphasis on the letter of 23 December 1957 written by Mr. Watkins. This letter, it will be recalled, was cited by the Court as having "made it clear that the Government *never* intended to either take or purchase any of plaintiff's property." (Opinion of Court of Claims, Appendix B, below, page 13, emphasis added.) The letter, written more than a month after Mr. Murdock had accepted and acknowledged passage of title of the property, and more than 3 weeks after Mr. Watkins had discussed the legal effect of Murdock's acceptance with Government counsel, purported to cover not only the property of petitioner but also the motor vehicles and other disputed personal property of the sponsor corporations. The letter returned the title papers for the motor vehicles and stated [CF 22]:

> "* * * The Government's position, as was stated in court, is that the Declarations of Taking No. 1 and 2, filed in court, did not include any of the personal property of [the sponsor corporations] which was not actually installed in the buildings on No-

vember 1, 1957. It is the Government's position that nothing was taken from the Biggs Rental Company."

If the reasoning of the Court of Claims is to be followed, Foster should have taken back the motor vehicles, the sponsor corporations' maintenance property, spare parts, and office furniture, as the "intentions" of the Government were now "made clear". In fact, however, as the District Court later held, the Government had already taken the motor vehicles and other personal property of the sponsor corporations, and subsequent declarations could not change the fact of taking into a non-taking.

Moreover, the letter conceded that the Government was taking property "actually installed in the buildings" but owned by the sponsor corporations. The officers who prepared the condemnation pleadings were admittedly ignorant of the existence of petitioner when they prepared and filed the pleadings. Nevertheless, at the time of such filing, 775 of petitioner's television antennas were physically installed on the houses being condemned. If the intention was to take "installed" personal property at the time the takeover occurred (1 November), it is abundantly clear that the decision not to take petitioner's property was a change from the original "intention", based on the fortuity that the condemning authorities had not done their homework in determining who owned the property before the condemnation pleadings were filed.

The pleadings in this case recite a number of theories, all of which are based on the promise of the Government to pay for private property when it is taken. The Court of Claims has held that the acts and representations of Government personnel did not amount to a "taking" of

petitioner's property, as a matter of law. The facts are that petitioner was excluded from Declarations of Taking which would otherwise have covered petitioner's property; that petitioner's property was physically seized and used by Government agents and military personnel at Fort Ord; that passage of title and possession of the property was formally acknowledged by a responsible representative of the condemning agency (with tacit ratification by his superior for more than a month); that the Government has had the property in its exclusive possession for more than 8 years; and that the petitioner has been paid nothing. The foregoing facts entitle petitioner to compensation in full for its property in the agreed amount of $69,308.66, as a matter of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERT W. LEVIT

Counsel for Petitioner

(Appendices A and B Follow)

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Appendix A

28 USCA § 1491 ("Tucker Act")

§ 1491. *Claims against United States generally*

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort. June 25, 1948, c. 646, 62 Stat. 940.

40 USCA § 258a ("Declaration of Taking Act")

§ 258a. *Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure*

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto——

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on ac-

count of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

Appendix B

In the United States Court of Claims
No. 420—61
(Decided December 17, 1965)

BIGGS RENTAL COMPANY v. THE UNITED STATES

Bert W. Levit, attorney of record, for plaintiff. *Long & Levit,* of counsel.

Rodney H. Hamblin, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.,* for defendant. *Kenneth H. Masters,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

OPINION

LARAMORE, *Judge,* delivered the opinion of the court:

This is an action for the alleged taking by the government of certain personal property owned by plaintiff. In the alternative, plaintiff claims restitution plus rent. Plaintiff alleges defendant took its personal property at Fort Ord, California, simultaneously with the condemnation of the property interests of two "Wherry" housing corporations,[1] namely, the Likins-Foster Ord and Likins-Foster Monterey Corporations.

[1]Under the Wherry Act (Housing Near Military Establishments), 63 Stat. 570 (1949), 12 U.S.C. §§ 1702, 1706, 1715c, 1716, 1748-1748(g) (1964), sponsor corporations, known as "Wherry"

In 1950, two Wherry housing projects of 500 units each were built for Fort Ord personnel at Monterey, California. The first project, known as Bay View Park, was owned by Likins-Foster Ord Corporation (hereinafter L-F Ord). The second project, known as North Bay View Park, was owned by Likins-Foster Monterey Corporation (hereinafter L-F Monterey). Both corporations were wholly-owned by the partnership, Likins-Foster & Associates, and later, by its successor, Likins-Foster Honolulu Corporation. T. Jack Foster was president of the above corporations.

Prior to the commencement of the L-F Ord and L-F Monterey projects, two other Foster-controlled corporations had started construction on Wherry housing at the Biggs Air Force Base in El Paso, Texas. As a result of discussions between Foster's partner and the Commanding General at Biggs regarding methods of increasing the occupancy rate of the housing units, a corporation was set up to purchase furniture for rental to service personnel whose own furniture had been delayed in shipment. It was necessary to use a separate leasing corporation because charter limitations of the Wherry Act forbid Wherry corporations from renting household furniture and television antennas.

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corporations, lease property from the government on which they build housing to be rented to military personnel. The lessees receive quarters allowances from the armed services and pay rentals directly to the corporations. Rental payments for furniture and television antennas, involved here, would not be covered by quarters allowances.

The Act, which provides certain financial and insurance benefits, requires that there be a separate corporation for each project.

The occupancy problem was the same at Fort Ord. Military personnel reporting for duty from foreign assignments frequently did not have the necessary furnishings for an unfurnished apartment. This caused great inconvenience because even though apartments were available, they were not usable for lack of furniture. After discussions concerning this problem between Foster, the Commanding General, and others at Fort Ord who had heard of the furniture rental operation at Biggs, a third corporation, the plaintiff, was incorporated. Plaintiff thereafter purchased apartment furnishings to rent to military personnel. The two Wherry corporations and plaintiff utilized the same office and the same employees and plaintiff stored its personal property in the warehouses owned by the Wherry corporations. The military tenants, if they chose to rent either household furniture or a television antenna, or both, entered into a rental agreement with plaintiff, separate from the rental of apartments from either of the Wherry corporations.

In January of 1957, it was determined that "Capehart" housing[2] would be constructed at Fort Ord, thus making it necessary for the government to buy or condemn the equities of L-F Ord and L-F Monterey. The United States Army Chief of Engineers as designee of the Secretary of Defense had the responsibility for acquiring the Wherry housing at Fort Ord. Under the special regulations issued

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[2]Under the Capehart Housing Act, the government owns and operates housing at or near military bases. Tenants do not pay for Capehart housing and, therefore, do not receive quarters allowances. The procedure for transforming Wherry housing into Capehart housing is provided for by 69 Stat. 635, 652 (1955), as amended, 70 Stat. 1091, 1111 (1956), 12 U.S.C. § 1748 (1964).

by the Office of the Chief of Engineers, the Real Estate Division of the San Francisco District, Corps of Engineers, was given the responsibility of carrying out the acquisition. On January 18, 1957, the San Francisco District Engineer's Office, by identical letters, advised L-F Ord and L-F Monterey that acquisition of their housing projects, situated within the Fort Ord Military Reservation, was mandatory. Inquiry was made in the letters as to whether L-F Ord and L-F Monterey would agree to negotiate. The two corporations, through their vice-president and attorney, Roy C. Lytle, agreed to negotiate.

On August 29, 1957, the San Francisco District Engineer's Office received a teletype from the Office of the Chief of Engineers, authorizing negotiations to acquire the two Wherry housing projects at Fort Ord. The teletype was received in advance of the Real Estate Directive (approved August 26, 1957), which was not received in the San Francisco District Engineer's Office until October 29, 1957. The Real Estate Directive, designated RE-D. 6950, set forth the interest to be acquired from L-F Ord and L-F Monterey as—

> Termination of sponsors' leasehold interest by purchase of sponsors' equities subject to outstanding mortgages.

Negotiations were commenced by telephone and by letter between Lytle for the two Wherry corporations and defendant's agents. Throughout negotiations for the acquisition of the housing interests of L-F Ord and L-F Monterey, there was no reference to, nor any negotiation with, the plaintiff. Plaintiff was neither a Wherry nor a sponsor corporation. The Chief of the Real Estate Divi-

sion, San Francisco District Engineer's Office, was not informed by the plaintiff of its existence or that it had property at Fort Ord until the court hearing on November 7, 1957. However, the Army authorities at Fort Ord were, at all times, familiar with the existence of the plaintiff and its property.

When negotiations for acquisition of the equities of L-F Ord and L-F Monterey failed, the Army was required by law to condemn the interests of the two Wherry corporations. The Chief of Real Estate in the San Francisco District Office, Army Engineers, had prepared the requisite pleadings. One complaint in condemnation and two declarations of taking were filed, all on November 1, 1957, with Declaration of Taking No. 1 describing the estates and interests of L-F Monterey Corporation, and Declaration of Taking No. 2 describing the estates and interests of L-F Ord Corporation. Included within the taking were 1,000 housing apartments, two warehouses, and items which were covered by chattel mortgages, namely, stoves, water heaters, refrigerators, and window shades, most of which were installed in the houses, but some were stored in the warehouses. The two Wherry corporations also owned numerous items of personal property not covered by the chattel mortgages, but used in connection with the operation and maintenance of the 1,000 housing units. On November 1, 1957, the Order for Delivery of Possession was issued and served on the two Wherry corporations. A dispute immediately arose as to whether the personal property owned by the two Wherry corporations, consisting of maintenance equipment, spare parts, and office furniture, but which was not covered by the chattel mort-

gages, was included within the term "apparatus and equipment" as used in the condemnation pleadings.

On November 1, 1957, plaintiff owned the following property at Fort Ord: an unworkable master television antenna system worth $37,820; 775 individual TV antennas installed in the housing units and rented on a monthly basis, worth $19,375; extra antennas and parts stored in the two Wherry warehouses, worth $537.66; and household furniture of all kinds, most of which was being rented to Wherry housing tenants, but some of which was stored, worth $11,576.

It is clear that there was confusion at the time as to the disposition of plaintiff's property. However, a review of the facts shows that by December the plaintiff knew or should have known that the defendant had no intention of including plaintiff's property in the condemnation proceedings. No documents or letters stating that the government was taking or wanted to purchase any of the plaintiff's property were served or mailed to the plaintiff and no notice was served on the tenants concerning property leased from the plaintiff. Plaintiff was not directed to stop its rental business and no government officer or representative, orally or in writing, told any of plaintiff's officials that it could not remove its personal property. The Army authorities did not use the master TV antenna system; it was inoperative at all times pertinent to this action. It was physically located on telephone and electric light poles, for which the plaintiff paid pole rent. Plaintiff was not named in the condemnation action, and none of its property was in any way described or referred to in the action. As a matter of fact, in a letter of December 23,

1957, the United States Army Engineer District, by registered mail, wrote to Likins-Foster & Associates in part, as follows:

> • • • It is the government's position that nothing was taken from the Biggs Rental Company.

On November 8, 1957, a meeting was held in the office of an Assistant United States Attorney, which was attended by Foster, Lytle, and representatives from the Justice Department, the Corps of Engineers and Fort Ord. Since the District Court had not ruled on whether the personal property had been condemned, this meeting was called to discuss the personal property of the two Wherry corporations and of the plaintiff. Foster and Lytle reiterated their stand that the condemnation proceedings included the personal property of all three corporations, and that they would leave it all at Fort Ord. The government representatives reiterated their opinion that the condemnation pleadings included only the items on the chattel mortgages and did not include any other personal property. Foster offered to disassemble the master television antenna system but was told that it might be used by the Army for educational television.

It was agreed at this meeting that two inventories would be prepared, one of all of the disputed maintenance personal property of L-F Ord and L-F Monterey, and the second of all of the rental personal property owned by the plaintiff. It was agreed that the values of the items would be arrived at using standard valuation methods and accepted depreciation schedules. The purpose of the inventories was that if the parties agreed as to the number and identification of the items and their value,

it would eliminate such issues from the condemnation trial. Thus, the only issue for the District Court that would be left would be the legal one, *i.e.*, was the personal property taken within the condemnation pleadings.

When the inventories were completed, on November 21, 1957, all parties were furnished duplicate copies of the joint inventories. Shortly thereafter, the three corporations ceased business at Fort Ord and left all of their personal property, as shown on the inventories, at Fort Ord, but advised defendant that they expected to be paid therefor. (Subsequent minor mathematical changes were made in the two inventories, which are immaterial to this case.) The Army then placed the personal property of the two Wherry corporations and of plaintiff in warehouses (with the exception of the inoperative master television antenna, which remained on public utility poles).

The property remained in the warehouses at the trial of the condemnation case on January 13, 1960. The United States District Court entered its order that the maintenance equipment, spare parts, office furniture, and service vehicles owned by the two Wherry corporations were condemned. The sum of $49,534.58, being the amount of the inventory previously agreed upon, was paid to the two Wherry corporations. Plaintiff appeared at the trial and the District Court found that the condemnation pleadings did not describe any property or property rights of the plaintiff. *Likins-Foster Monterey Corporation* v. *United States,* 308 F.2d 595 (9th Cir. 1962).

Under the above facts, we are called upon to determine whether in fact there was a taking of plaintiff's property by the government for which payment is owing. In this

connection, it is well settled that to constitute a taking there must be an intent on the part of the Unied States to take plaintiff's property. As this court stated in *B. Amusement Co.* v. *United States,* 148 Ct. Cl. 337, 341, 180 F. Supp. 386, 389 (1960):

> To constitute a taking there must be an intent on the part of the United States to take plaintiff's properties, or, at least, an intention to do an act the natural consequences of which was to take the property.

This is the issue in this case and the conclusion is inescapable that the defendant did not intend to nor did it take the property in question.

The facts show that the defendant did not use plaintiff's property or prevent plaintiff from continuing its rental business; nor did defendant prevent plaintiff from removing its personal property. There was no directive or order issued by the Army to acquire any of plaintiff's property and no negotiations to purchase any of it.

The evidence shows that continuation of plaintiff's rental business probably would have been unprofitable because plaintiff no longer could utilize the office space, warehouse space, or employees of the Wherry corporations as it had done before the condemnation. Under those circumstances, the evidence clearly shows that plaintiff's representatives left all of its personal property at Fort Ord and it is there today.

Plaintiff says a government agent informed it that the Army wanted the master antenna system for use in an educational program and that this evidenced a contract to purchase the same. Even if plaintiff was told this, the letter of December 23, 1957, previously quoted in part,

made it clear that the government never intended to either take or purchase any of plaintiff's property. Assuming the government employee stated the Army wanted the system, there is no evidence to indicate that he had power to enter into a contract to purchase the system. Thus we think the conduct of plaintiff through its officers indicated an intention to abandon the property.[3] At least, when informed it could have the property, the plaintiff made no effort to remove the same. In those circumstances the government was more or less in the role of an involuntary bailee. As such, the government had the duty only to reasonably protect the property while in storage. This it did. The government placed roving guards around the premises and did everything necessary to protect plaintiff's property.

Respecting plaintiff's claim for the rental value of its property, the facts show that the plaintiff has failed to prove any fair market value for the rental of any or all of its property, nor has plaintiff shown that it is entitled to any rent for the property.

In summary, we hold that the evidence fails to establish a taking of plaintiff's property for which recovery can be had, and plaintiff's petition, therefore, must be dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

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[3]We do not use the word "abandon" in the usual technical sense, *i.e.*, that plaintiff left the property on the premises without ever intending to either be paid for same or to ever take steps for the return thereof.

1. Plaintiff, a corporation organized and existing under the laws of the State of Oklahoma, is and at all times pertinent to this case was doing business in the State of California.

2. Commencing in about 1950, two Wherry housing projects (500 housing units in each) were built on the Fort Ord Military Reservation, Monterey, California. The first project, designated as Bay View Park, was owned by Likins-Foster Ord Corporation (sometimes hereinafter referred to as L-F Ord). The second project, designated as North Bay View Park, was owned by Likins-Foster Monterey Corporation (sometimes hereinafter referred to as L-F Monterey).

Both of these corporations were wholly owned subsidiaries of the partnership, Likins-Foster & Associates, and later, of its successor, Likins-Foster Honolulu Corporation (hereinafter referred to as L-F Honolulu).

Mr. T. Jack Foster was president of both of the two Wherry housing corporations at Fort Ord.

L-F Ord and L-F Monterey were also commonly known as "sponsor" corporations and/or "Wherry" corporations. These two corporations were incorporated under the Wherry Housing Act, 63 Stat. 570. The Wherry Act required that there be a separate corporation for each project.

3. Prior to the commencement of the L-F Ord and L-F Monterey projects, two other Foster-controlled corporations had started construction on Wherry housing at the Biggs Air Force Base (hereinafter referred to as Biggs AFB), El Paso, Texas. As a result of discussions between

Foster's partner and the Commanding General at the Biggs AFB, in order to increase the occupancy rate of the housing units and as a convenience to the incoming personnel, furniture was purchased for rental to service personnel whose personal furniture had been delayed in shipment.

4. L-F Ord and L-F Monterey did not own the land upon which the 1,000 housing units were constructed, both projects being situated within the Fort Ord Military Reservation. Each corporation did, however, hold a long-term lease with the Army on this land within the military reservation and for which they paid a nominal rental to the Army.

5. Although plaintiff company was originally owned by three shareholders other than the shareholders of L-F Ord and of L-F Monterey, its principal purchases were secured through or guaranteed by a partnership, Likins-Foster & Associates. Mr. T. Jack Foster and his associates also controlled this partnership.

On or about January 31, 1955, Likins-Foster & Associates was bought by L-F Honolulu.

6. Certain charter limitations, which restricted the activities of L-F Ord and L-F Monterey, prevented the corporations from engaging in the rental of household furniture and television antennas to the occupants of their housing units.

The military personnel would sometimes report for duty at Fort Ord from foreign assignments without the necessary furnishings for an unfurnished apartment. This caused much inconvenience in that although apartments were available for them, they were not able to utilize the

apartments because of the lack of furniture. It also increased the vacancies of the two Wherry projects because, whereas tenants were available, tenants with furniture to utilize the apartments were not always available.

After discussions concerning the above-described problem between Foster, the Commanding General, and others at Fort Ord, who had heard of the furniture rental operation at Biggs AFB, a third corporation, the plaintiff herein, was incorporated, which company thereafter acquired a quantity of apartment furnishings which were placed in a pool from which they were rented by the plaintiff to military personnel reporting in advance of receipt of their furnishings.

7. At all times material to this action, T. Jack Foster, president of both L-F Ord and L-F Monterey, was also president of the plaintiff, Biggs Rental Company. All three of these corporations, as wholly owned subsidiaries of L-F Honolulu, were now under a common ownership. L-F Honolulu was also controlled by Foster and his associates.

8. Plaintiff, L-F Ord, and L-F Monterey shared a common "project" office at Fort Ord, but each corporation kept a separate set of books. The employees of the three corporations, including plaintiff, performed their services for all three corporations without distinction. Employees were paid by checks drawn by L-F Ord. The management of the three corporations was substantially coextensive.

9. Furniture or television antenna rental was an optional service to be purchased by tenants of the Wherry projects and neither service was a requisite for rental of an apartment unit. Furniture and television rental fees

were paid at the same office at which rent for the apartments was paid, *i.e.*, in the "project" office, referred to above, a converted rental building. Plaintiff's excess furniture inventory was stored in a concrete warehouse owned by L-F Ord and L-F Monterey. Plaintiff's rental arrangements and rates were approved by the Army authorities at Fort Ord.

10. In early 1957 the Army approved the construction of so-called "Capehart" housing units at Fort Ord. Wherry housing differed from the Capehart housing in that the Wherry units were privately owned and were operated as "private" quarters, whereas the Capehart units were Government-owned, Government-operated, and were designated as "public" quarters. The military tenants of the Wherry units received the statutory quarters allowance from the Army and paid their own monthly rentals, whereas the military tenants of the Capehart units were assigned free quarters and, therefore, did not receive the statutory quarters allowance.

Under the provisions of section 404 of the Housing Amendments of 1955 (69 Stat. 635, 652), as amended by section 512 of the Housing Act of 1956 (70 Stat. 1091, 1111), the Secretary of Defense, or his designee, was required to acquire all Wherry housing located at, or near, a military reservation before Capehart housing could be occupied.

11. In January 1957 it was determined that Capehart housing would be constructed at Fort Ord, thus making it necessary for the Government to buy or condemn the equities of L-F Ord and L-F Monterey. The Chief of Engineers, United States Army, had the responsibility for

acquisition of the Wherry housing at Fort Ord. Under the special regulations issued by the Office of the Chief of Engineers, the Real Estate Division of the San Francisco District, Corps of Engineers, was given the responsibility for carrying out the acquisition.

On January 18, 1957, the San Francisco District Engineer's office, by identical letters, advised L-F Ord and L-F Monterey that acquisition of their housing projects, situated within the Fort Ord Military Reservation, was mandatory. Inquiry was made in the letters as to whether L-F Ord and L-F Monterey would agree to negotiate.

The two corporations, through their vice president and attorney, Roy C. Lytle, agree to negotiate.

No mention of plaintiff or plaintiff's property was made in any communication to, or from, either L-F Ord, L-F Monterey, or their attorney, and the Army.

12. On August 29, 1957, the San Francisco District Engineer's office received a teletype from the Office of the Chief of Engineers, authorizing negotiations to acquire the two Wherry housing projects at Fort Ord. The teletype was received in advance of the Real Estate Directive (approved August 26, 1957), which directive was not received in the San Francisco District Engineer's office until October 29, 1957. The Real Estate Directive, designated as RE-D 6950, set forth the interest to be acquired from L-F Ord and L-F Monterey as—

> Termination of sponsors' leasehold interest by purchase of sponsors' equities subject to outstanding mortgages.

Negotiations were commenced by telephone and by letter between Roy C. Lytle, attorney and vice president for the

two Wherry corporations, and Harlan B. Watkins, Chief of the Real Estate Division for the San Francisco District Engineer's office, and Herman Maxwell, Chief of the Acquisition Branch, a subordinate in Mr. Watkin's office. Throughout negotiations for the acquisition of the housing interests of L-F Ord and L-F Monterey, there was no reference to, nor any negotiation with, the plaintiff. In any event, negotiations between the parties were of short duration. Plaintiff was not a Wherry or a sponsor corporation. The Chief of the Real Estate Division, San Francisco District Engineer's office, was not informed by the plaintiff of its existence or that it had property at Fort Ord until the court hearing on November 7, 1957. However, the Army authorities at Fort Ord were, at all times, familiar with the existence of the plaintiff and its property.

13. On November 1, 1957, plaintiff owned the following property at Fort Ord within the reservation:

(a) A master television antenna system, installed on poles owned by either the "Telephone Company" or the "Electric Company," under a license from such companies to the plaintiff. The system was installed in 1953 at the North Bay View Park project, but it never worked satisfactorily. After a year of operation, it was shut down and it never worked again. This item is valued at $37,820. Plaintiff has paid pole rental to the licensor up to the present time.

(b) Seven hundred and seventy-five individual TV antennas, installed in the housing units and rented to the tenants on a monthly basis. They were first connected in the Bay View Park project, and later, after the master

TV system proved unworkable, they were connected in the North Bay View Park project. The value of these antennas is $19,375.

(c) Extra antennas, antenna poles, ladders, tools, antenna parts, and clamps used for putting up, taking down, repairing, and replacing the antennas. All of these items were stored in the two warehouses owned by the two Wherry housing corporations. The value of these items is $537.66.

(d) Household furniture, consisting of beds, springs, mattresses, tables, chairs, chests, bureaus, mirrors, sofas, etc., being rented to tenants of the Wherry housing units on a month-to-month basis. The items not then being rented were stored in the concrete warehouse. The value of all of the household furniture is $11,576, but there is no evidence as to the value of the items being rented as opposed to the value of the items stored in the concrete warehouse on November 1, 1957, or at any later date.

None of the items of property owned by plaintiff were necessary or were required in the operation or maintenance of the 1,000 Wherry housing units as such. The television antennas and furniture were rented to the military tenants on separate forms and agreements from those used for the rental of the units, and separate rental was paid to the plaintiff. Plaintiff had no employees stationed at Fort Ord that were distinct from the employees of L-F Monterey and L-F Ord. The tenants of the Wherry housing were not required to rent furniture or a television antenna in order to rent a Wherry house or apartment. The rental of furniture or a television an-

tenna was a voluntary contractual arrangement between the tenant and the plaintiff.

It was, of course, necessary for those military tenants, whose reporting date at Fort Ord preceded the arrival of their furniture from overseas, to have furniture if they were to take advantage of the Wherry housing units, and this made it necessary that they rent furniture from some source.

14. When negotiations for the acquisition of the housing units failed, a condemnation assembly, prepared by the Real Estate Division of the San Francisco District Engineer's office, was forwarded through the Office of the Chief of Engineers, U.S. Army, to the Attorney General, and, in turn, to the U.S. Attorney's office in San Francisco, California.

At 8:55 a.m. on November 1, 1957, a Complaint in Condemnation (Civil Action No. 36839) was filed in the United States District Court for the Northern District of California, Southern Division. Simultaneously therewith, Declaration of Taking No. 1, directed against the Likins-Foster Monterey Corporation, and Declaration of Taking No. 2, directed against the Likins-Foster Ord Corporation, were filed in the case.

At 9:15 a.m. the Court signed an Order for Delivery of Possession, which ordered:

> • • • all defendants in this action and all persons in possession or control of the property described in the Complaint in Condemnation filed herein shall surrender possession of the said property on November 1, 1957 at the hour of *9:15* o'clock *A.M.*, to the extent of the estate being condemned, to plaintiff, provided

> that a copy of this Order shall be served upon all persons in possession or control of the said property forthwith.

This order was served upon an officer of the two Wherry corporations at approximately 4:30 p.m. on November 1, 1957, at San Jose, California. The plaintiff was not named as a party in any of the condemnation pleadings filed by the Government.

The judgment entered on June 15, 1960, in the condemnation action (Civil Action No. 36839), found that the Complaint and the two Declarations of Taking did not describe any property or property rights belonging to the plaintiff (plaintiff having appeared orally, through counsel, at the condemnation trial) and that the plaintiff had no interest in the property taken under the Complaint or under the Declarations of Taking. (Judgment affirmed, *Likins-Foster Monterey Corporation and Likins-Foster Ord Corporation v. United States*, 308 F. 2d 595 (9th Cir. 1962).)

On October 31, 1957, the Billeting Officer at Fort Ord notified each tenant, by letter, as follows:

> Department of the Army plans to complete a contract at a very early date with Likins-Foster Corporation pertaining to the Wherry Housing Units at Fort Ord, California. In order to avoid any complications, the Commanding General, Fort Ord, desires that *NO REPEAT NO* rent be paid by occupants of Wherry Housing for the month of November until further notice.

On November 1, 1957, the Commanding General of the Sixth Army (San Francisco) sent a telegram to the Commanding General of Fort Ord, which read:

The Office of the US Attorney, San Francisco, has filed a Complaint of Condemnation together with a Declaration of Taking for the acquisition of the sponsor's [sic] interests in the Wherry Housing at Fort Ord, California.

The order of immediate possession effective November 1, 1957, was entered by the court.

The Commanding General, Fort Ord, California, will assume responsibility for custody, operation and maintenance of the Wherry Housing Units at Fort Ord, Cailfornia, as of 0915 hours, 1 November 1957. Additional instructions will follow.

At approximately 4 p.m., November 1, 1957, the Chief of Staff, Fort Ord, sent a letter, by messenger, to G. Lee Mackey, the project manager for the two Wherry corporations (and also resident manager of the plaintiff's operations), advising him of the contents of the above-quoted telegram, that the Army had condemned the sponsors' interests in the Wherry housing, and that the Commanding General, Fort Ord, was assuming responsibility for custody, operation, and maintenance. No documents or letters stating that the Government was taking or wanted to purchase any of the plaintiff's property were served or mailed to the plaintiff, and no notice was served on the tenants concerning property leased from the plaintiff. The plaintiff was not directed to stop its rental business; nor was the plaintiff told that it could continue its rental business. No notice stating that rental payments for the plaintiff's personal property should continue was served on any tenant.

15. On November 1, 1957, L-F Ord and L-F Monterey held numerous utility easements; 1,000 housing units

(apartments constructed on land owned by the United States), one unit of which was used as a "project" office by L-F Ord, L-F Monterey, and the plaintiff; a concrete warehouse (partially occupied by part of the plaintiff's inventory); a sheetmetal warehouse; some 1,000 ranges and refrigerators; and numerous window shades, most of which items were installed in the housing units, with some stored in the concrete and sheetmetal warehouses (all of which were subject to the chattel mortgages). L-F Ord and L-F Monterey also owned 9 motor vehicles and numerous items of equipment, office furniture, and spare parts, all of which were utilized by the two Wherry corporations for the maintenance and operation of the 1,000 housing units. The two Wherry corporations employed 25 to 30 workers at Fort Ord on November 1, 1957. The two Wherry corporations were paid, in full, for all of the items above listed, following a condemnation trial in the United States District Court and after appeal to the Ninth Circuit.

Prior to November 1, 1957, the housing units were occupied by military personnel who rented the apartments from the two Wherry corporations. After the filing of the condemnation action on November 1, 1957, the 1,000 housing units were changed from "private" quarters to "public" quarters. There was no change in occupancy —the tenants remained the same—but the tenants no longer received a statutory quarters allowance and they were no longer charged rent for the apartments. On October 31 and November 1, 1957, the Army authorities at Fort Ord stationed a soldier outside the "project" office to advise the military tenants not to pay their November rent because (1) the tenants would not receive their statu-

tory quarters allowance from the Army, and (2) if they paid their rent, they might have to wait for a refund. It does not appear that information regarding payment of rent to the plaintiff for furniture and/or television antennas was either specifically included or excluded from this advice.

16. (a) The terminology used in the Complaint in Condemnation and in the two Declarations of Taking created some confusion as to what property was included within the Order of Possession. The pertinent part of Declaration of Taking No. 1 reads:

> 3. The estates taken are as follows:
>
> (a) All right, title and interest of Likins-Foster Monterey Corp., arising out of lease dated June 27, 1952, bearing Contract No. DA(s) 04-203-eng-271, between the Secretary of the Army, representing the United States of America, and Likins-Foster Monterey Corp., a Delaware Corporation, together with all the tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcels Nos. 1, 2 and 3, and being the property of said corporation; subject to the rights of Pacific Gas and Electric Company * * *
>
> * * * * * *

The identical wording was also used to describe the interests of L-F Ord in Declaration of Taking No. 2, except for a different lease number, and the wording in both declarations essentially corresponds to the equivalent language in the Complaint in Condemnation.

The words "apparatus" and "equipment" created the confusion. From November 1, 1957, the Army at Fort Ord did not know whether the Order of Possession in-

cluded any personal property of the two Wherry corporations, except for the items in the chattel mortgages, described in the Complaint in Condemnation and in the Declarations of Taking. There was no dispute or confusion concerning the two Wherry sponsors' interests in the leases as such interests were described in the Complaint in Condemnation and were included in the Order of Possession.

The confusion was compounded by the failure of the Army Command to establish a firm position of the meaning of the Order of Possession and by the Army's need to use certain supplies for current maintenance and operation, such supplies being clearly personal property of L-F Ord and L-F Monterey.

(b) From 9:15 a.m. until approximately 4 p.m. on November 1, 1957 (Friday), there were no meetings between representatives of the Army and representatives of L-F Ord and L-F Monterey. The Wherry corporations continued to operate the Wherry projects up until 4 p.m., when they were given a letter from the Chief of Staff, Fort Ord. (See finding 14.) Shortly thereafter an oral working agreement was entered into at Fort Ord between Col. William E. Holley, Fort Ord Post Engineer, and G. Lee Mackey, project manager for L-F Ord and L-F Monterey, for the use of L-F Ord's and L-F Monterey's spare parts for maintenance over the weekend. Maintenance personnel of L-F Ord and L-F Monterey were placed on the Army's payroll as of November 2, 1957, for that portion of their work which constituted maintenance. Many of these same employees remained on L-F Ord's and L-F Monterey's payroll for that portion of their later work

which was involved in the taking of the inventories of L-F Ord's, L-F Monterey's, and the plaintiff's assets at Fort Ord.

Beginning about November 4th or 5th, as each spare part belonging to L-F Ord or to L-F Monterey was taken from the warehouse, it was listed jointly by a man representing the Wherry corporations and by an Army employee. Some spare parts of the Wherry corporations had already been taken by the Army without this immediate accounting, and L-F Ord's and L-F Monterey's trucks had been used by the Army for maintenance activity.

(c) The plaintiff had received rental for furniture and television antennas for the month of November 1957, since rental was payable in advance, but it was voluntarily refunded to the tenants by the plaintiff.

(d) Prior to and on November 1, 1957, L-F Ord and L-F Monterey maintained locks on the two warehouses (wherein some of the plaintiff's property was stored). These keys and others were gathered by the superintendent of maintenance, at the project manager's direction, and were left in the rental office. The only keys owned exclusively by the plaintiff were those to the master television antenna system control box. The project manager mailed these keys to the Army at Fort Ord. The keys were returned by mail to the project manager, and they were again returned to the Army. Somewhere between November 1st and 2d, Army personnel placed additional padlocks on the two warehouses; L-F Ord and L-F Monterey then installed their own locks on November 5th at the direction of their president, T. Jack Foster. Thus, each warehouse then had two locks installed, the keys for

one lock being held by the Army and the keys for the other lock being held by the project manager. The concrete warehouse was integrated into the Fort Ord guard (police) system.

L-F Ord's, L-F Monterey's, and the plaintiff's personnel had access to these warehouses at all times, subject to finding authorized Army personnel to unlock the warehouses.

The two warehouses were condemned and were included in the Order of Possession. Inside the warehouses were stored, among other things, some ranges and refrigerators which were described by serial number in Exhibit "A" to the chattel mortgages, referred to in the Complaint in Condemnation and in the two Declarations of Taking. The advice given to Fort Ord on October 31st and November 1st was that only real property was taken, and Colonel Holley's calls to the Sixth Army, for clarification, concerned the Wherry housing maintenance materials. Fort Ord received instructions to take only the realty and chattel mortgage personalty. Confusion arose because of the following: uncertainty about the legal limits of the condemnation action, an estimated requirement for L-F Ord's and L-F Monterey's spare parts for maintenance, and by Likins-Foster personnel saying that the Army instructions were wrong, and that L-F Ord and L-F Monterey (and, by implication, the plaintiff) were leaving the items of personal property which the plaintiff contended were taken in the condemnation action but which items Fort Ord had no instructions to accept.

(e) The Army authorities decided to leave all furniture and television antennas (which had previously been

rented to tenants) where they were until the dispute over the extent of the condemnation order could be resolved. These items continued to be used by the tenants until the furniture was removed by the Army from the apartment units to the warehouses, sometime between November 1 and December 15, 1957. No rental had been paid for the use of any furniture or TV antennas after November 1, 1957.

(f) Sometime after November 1, 1957, the radio sets on L-F Ord's and L-F Monterey's vehicles were cannibalized by the Army Post Signal Officer.

(g) On or about November 1, 1957, Army authorities took possession of the "project" rental office and used it for their operation. A desk, used by T. Jack Foster, was emptied of its contents; however, L-F Ord's, L-F Monterey's, and the plaintiff's personnel continued to use the office, at least during the inventory period.

17. On Monday, November 4, 1957, at 11 a.m., a conference was held in the Office of the Deputy Post Commander at Fort Ord. It was attended principally by John Goss, Ralph E. Chase, and William A. Innes, officers of L-F Ord and L-F Monterey (and the plaintiff) and the Deputy Post Commander, James L. Hathaway, the Post Engineer, Col. William C. Holley, and John F. Murdock, Chief of the Property Accounting office, from the San Francisco District Engineer's office. At this meeting the representatives of L-F Ord and L-F Monterey stated that they interpreted the Order of Possession, entered on November 1, 1957, to include all of the Wherry housing property, and they demanded that Murdock conduct an inventory of all property owned by the Wherry corpo-

rations. Mr. Murdock had instructions from the San Francisco District Engineer's office to inventory only the real property, described in the two Declarations of Taking, and the ranges, refrigerators, water heaters, and venetian blinds, which were described in Exhibit "A" attached to each chattel mortgage.

An Army representative stated that there were items, belonging to L-F Ord and L-F Monterey, stored in the warehouses, which items the Army would like to have for the maintenance of the housing units, and that there were other items which the Army didn't want.

Prior to the meeting of November 4, 1957, Colonel Hathaway had inquired of Mackey the cost of making the master television antenna system operative. He was furnished this information. Subsequently, Colonel Hathaway privately discussed with Murdock the retention of the system by the Army for use in an educational television program.

At the November 4, 1957, conference, Army authorities informed L-F Ord and L-F Monterey representatives that no personal property had been taken, except the items described in Exhibit "A" to the chattel mortgages; and Mr. Murdock, who was sent to Fort Ord for property matters and who had the responsibility for inventorying the property taken, refused to inventory any personal property not listed on Exhibit "A" to the chattel mortgages.

Throughout November 4th (Monday) items of spare parts, owned by the two Wherry corporations, taken from the warehouse and from a maintenance truck, were utilized by the Army to service the 1,000 housing units. No agree-

ment regarding the personal property was reached on November 4th between the Army representatives and L-F Ord's and L-F Monterey's representatives (who were also representatives of the plaintiff). The plaintiff was not mentioned in the discussion of November 4th. No property of the Biggs Rental Company was taken from the warehouse. Property already in the rental units, belonging to the plaintiff, continued to be used by the Army personnel who were tenants, however.

On November 5, 1957, T. Jack Foster, president and owner of the controlling interest in L-F Ord, L-F Monterey, and the plaintiff, met at Fort Ord with Colonel Holley and Mr. Murdock. At that time, Colonel Holley informed Foster that the Army was not taking personal property. Mr. Murdock still refused to inventory the personal property. Mr. Foster had his employees place their own padlocks on the Wherry warehouses, which then could be opened only by the Army and Likins-Foster personnel jointly. Later that day, Colonel Hathaway and Colonel Holley reversed their policy—the Army ceased utilizing spare parts of the two Wherry corporations, and they advised Foster that the Army would adopt a "hands off" policy concerning the maintenance items located within the warehouse. The Army retained keys to the warehouses, however (see finding 22).

On November 5th, Foster placed a telephone call to a Washington, D.C., associate and complained that the Army at Fort Ord had refused to cooperate. Col. Paul Symbol, Chief of the Family Housing Division (Pentagon), telephoned Foster at Fort Ord and talked with him, Colonel Holley, and Mr. Murdock, on extensions. Colonel Symbol's

instructions pertinent to the dispute were that the only personal property taken by the Army was that of the Wherry corporations, as described in the chattel mortgages.

Mr. Foster consistently took the position that all personal property had been taken and that he would leave it all in place.

On November 4th and 5th, telephone calls were placed by Fort Ord Army authorities and by Sixth Army Headquarters to Harlan B. Watkins, Chief of the Real Estate Division of the San Francisco District Engineer's office, who, in turn, placed telephone calls to the Chief of Engineers, Real Estate Office, Washington, D.C. All of these calls were of an inquiring nature, wherein advice was sought as to whether the wording in the Declarations of Taking in the condemnation action included any personal property of L-F Ord and L-F Monterey, other than that described in Exhibit "A" to the chattel mortgages. Mr. Watkins did not know of the existence of the plaintiff until November 7, 1957.

The Army representatives and all Government officers mentioned varied in their opinions as to whether the automobiles and the spare parts owned by the two Wherry corporations were included within the broad language set forth in the condemnation pleadings.

18. On November 7, 1957, Roy C. Lytle appeared in the United States District Court in San Francisco on behalf of L-F Ord and L-F Monterey, Wherry sponsors. The Government was represented by Charles R. Renda, Assistant United States Attorney.

Mr. Lytle requested on behalf of L-F Ord and L-F Monterey that he be allowed to withdraw, from deposit with the Court, $783,000 deposited with the two Declarations of Taking, and, further, he made an oral appearance on behalf of the plaintiff. This was the first time that Watkins was aware of the existence of the plaintiff or that it owned any rental personal property at Fort Ord. Mr. Lytle asserted the position that the two Declarations of Taking and the Order of Possession, filed and entered on November 1, 1957, included all the property of the three corporations and that all property was to be left at Fort Ord. Mr. Renda argued for the Government that the Declarations of Taking did not include the personal property, other than that described by the chattel mortgages.

19. On November 8, 1957 (Friday), a meeting was held in the office of Mr. Renda, Assistant United States Attorney, attended by Mr. Foster and his attorney, Mr. Lytle, Mr. Renda for the Department of Justice, Mr. Watkins, Mr. Rodney H. Hamblin, and Mr. Murdock of the San Francisco Corps of Engineers, Colonel Holley of Fort Ord, Colonel Potter of the Sixth Army, and some others. Since the District Court had not ruled on whether the personal property had been condemned, this meeting was called to discuss the personal property of the two Wherry corporations and of the plaintiff. Mr. Foster and his attorney reiterated their stand that the condemnation proceedings included the personal property of all three corporations, and that they would leave it all at Fort Ord. The Government representatives reiterated their opinion that the condemnation pleadings included only the items on the chattel mortgages, but did not include any other personal property.

Mr. Foster offered to disassemble the master television antenna system but was told that it might be used by the Army for educational television.

It was agreed at this meeting that two inventories would be prepared, one of all of the disputed maintenance personal property of L-F Ord and L-F Monterey, and the second of all of the rental personal property owned by the plaintiff. It was agreed that the values of the items would be arrived at, using standard valuation methods and accepted depreciation schedules. The purpose of the inventories was that if the parties agreed as to the number and identification of the items and their value, it would eliminate such issues from the condemnation trial. Thus, the only issue for the District Court that would be left would be the legal one, *i.e.*, "Was the personal property taken within the condemnation pleadings?"

20. On November 11, 1957 (Monday), Murdock of the Army Corps of Engineers proceeded to Fort Ord to take the inventories in conjunction with L-F Ord's, L-F Monterey's, and the plaintiff's employees.

On November 21, 1957, the inventories of all of the disputed personal property of L-F Ord, L-F Monterey, and the plaintiff, were completed, pursuant to the above-described arrangements.

On that same day, Mr. Foster dictated two letters, addressed to the "District Engineer, U.S. Army Engineer District, San Francisco," in the presence of Mr. Murdock and members of his staff and in the presence of the Likins-Foster staff. He signed these letters as president of L-F Ord, L-F Monterey, and the plaintiff. Mr. Murdock then endorsed each letter "Accepted by: John F.

Murdock, Chief, Property Accounting Branch, San Francisco District."

The first letter reads as follows:

Representatives of the Army and representatives of Likins-Foster Ord Corp., Likins-Foster Monterey Corp., Biggs Rental Co., a corporation, have made a thorough inventory of the stock, supplies and equipment on hand November 1, 1957, which was the date the Army took possession of the 1,000 Wherry housing units at Ford Ord, California. The quantity of the items and the price of the items, $99,947.89, has been agreed upon and a list is attached to this letter.

My attorney has advised me that the order of taking as filed condemns all furniture, fixtures, equipment, supplies and motor vehicles. As President of these three corporations, I am leaving all furniture, fixtures, equipment, supplies and motor vehicles in the possession of the Army and will expect remuneration either from the Army or I will expect remuneration in the form of a judgment in federal court.

In May, 1953, our company contracted for a community television antenna system to serve 500 units in North Bay View Park at a cost of $48,800.00. We were going to charge the tenant $5.00 a unit for the original hookup and $8.00 a month rental. This was all done with the knowledge and consent of the Army. This system has never worked satisfactorily and we have been assured by an expert that this system could be put in working order for approximately $5,000.00. Our company has a bond for the proper completion of this system and a suit will be instigated by our company against the contractor and the bonding company and it is agreed that any amount we should recover in this suit will be retained by this company for the damage we have suffered.

Possession of and title to the items on all lists were passed to the Army on the morning of November 1, 1957.

Yours very truly,
Likins-Foster Ord Corp.
Likins-Foster Monterey Corp.
Biggs Rental Co.
/s/ T. Jack Foster
T. Jack Foster, President

Accepted by
/s/ John F. Murdock
John F. Murdock, Chief,
Property Accounting Branch
San Francisco District
TJF/mhs
Enc.

Nov. 21, 1957

Recap of Inventories

Likins-Foster Ord. Corp. and Likins-Foster Monterey Corp. Main Warehouse	$15,713.81
Bench stock and tools	
Radio	2,274.90
Equipment and spare parts	
Metal Warehouse	6,759.48
Bench stock and tools	
Wood Shed	2,172.79
Bench stock and tools	
Automotive Equipment	10,290.00
Office Furniture, Equipment and Supplies	9,831.00
Stationery and Supplies	1,463.74
Telephone System	705.01
Used to activate water pump	
Sub Total	49,210.73
Biggs Rental Co.	
Furniture and TV Antennas	12,917.16
Master TV System	37,820.00
Total	99,947.89

Note: It has been agreed that 15% handling charges should be added to specified figures of the inventory but that this has been waived.

/s/ JFM
/s/ TJF

The second letter provides:

This acknowledges receipt of the ownership certificates of the motor vehicles listed below:

Make	*Year*	*Engine number*
Chevrolet	1954	0006549F55X
Chevrolet	1957	A570111267
Chevrolet	1954	1011028F54N
Chevrolet	1951	JBA726796
Chevrolet	1954	JBA494492
Chevrolet	1954	JCA455649
Chevrolet	1953	JCA1016999
Chevrolet	1954	JBA518161
Willys Jeep	1953	35122452A

This also acknowledges receipt of all the keys to all the locks and all of the keys to the rental office.

Yours very truly,
Likins-Foster Ord Corp.
Likins-Foster Monterey Corp.
Biggs Rental Co.
/s/ T. Jack Foster
T. Jack Foster, President

Accepted by:
/s/ John F. Murdock
/s/ John F. Murdock, Chief,
Property Accounting Branch
San Francisco District
TJF/mhs
Enc.

Mr. Murdock was the only responsible representative of the Office of the District Army Engineer present at Ford Ord during all times pertinent to these findings. Mr. Murdock was not a contracting officer.

21. On November 22, 1957, Mr. Foster wrote a letter to Col. Paul Symbol, Family Housing Division (Pentagon), Washington, D.C., which reads, in part, as follows:

> * * * As far as that is concerned they [local office of engineers] have not received instructions to this date. I have taken the position that the order of taking included all supplies, furniture, equipment, fixtures and motor vehicles.
>
> * * * * * *

22. Upon completion of the inventories, Murdock returned to his office in San Francisco and delivered to the Chief of the Real Estate Division (Watkins) the automobile registration certificates ("pink slips"), which accompanied Foster's second letter of November 21st (see finding 20), together with copies of the two letters of November 21st, prepared by Foster and endorsed by Murdock at Fort Ord.

Mr. Murdock executed a DD Form 290 in order to transfer intra-governmental responsibility for the inventoried items to the Army authorities at Fort Ord.

On November 27, 1957, Watkins of the Corps of Engineers consulted with Foster but he made no comment on the effect of the letters of November 21st. Also, on that same day, Murdock wrote to Foster, enclosing amended inventory pages for approval. His letter was acknowledged, and the inventory changes were approved by Likins-Foster, by letter dated December 3, 1957.

On or about November 27, 1957, Mr. Watkins and his office attorney, Mr. Hamblin, consulted about the implications of Mr. Murdock's signature appearing on the

Foster letters, dated November 31st. Either Mr. Maxwell, Chief of the Acquisition Branch, under Mr. Watkins, or Mr. Hamblin, instructed Murdock to have Fort Ord personnel furnish a duplicate set of keys to Likins-Foster.

This was done by Fort Ord authorities and the keys to the warehouses and to the Wherry "project" rental office were sent, by registered mail, to Likins-Foster & Associates, and receipted for by G. Lee Mackey on December 12, 1957.

On December 23, 1957, the U.S. Army Engineer District (San Francisco), by registered mail, returned the automobile registration certificates ("pink slips") to Likins-Foster & Associates. The letter stated, in part, as follows:

> Both letters referred to above [Foster's letters of November 21, 1957], bear the phrase "Accepted By;" at the bottom of each letter, followed by the signature of John F. Murdock, Chief, Property Accounting Branch, San Francisco District. The Government's position, as was stated in court, is that the Declarations of Taking No. 1 and 2, filed in court, did not include any of the personal property of Likins-Foster Ord Corp. or Likins-Foster Monterey Corp., which was not actually installed in the buildings on November 1, 1957. It is the Government's position that nothing was taken from the Biggs Rental Company.
>
> The office has advised Ft. Ord to return duplicate keys to the warehouse and office so that you may remove your personal property at any time. It is the position of this office that unless the Court rules otherwise, the non-installed personal property and vehicles of the two sponsor corporations and all of the Biggs Rental Company property is in possession of

and is still owned by the said companies. Its presence on Government property makes the Government an involuntary custodian.

If we receive any instructions from our higher command, we will advise you.

Sincerely yours,
/s/ Harlan B. Watkins
Harlan B. Watkins
Chief, Real Estate Division

The "pink slips" referred to above were still in the possession of L-F Ord and L-F Monterey as late as June 10, 1960.

23. None of the plaintiff's property was directly used by the Army. Furniture and television antennas at the apartment units continued to be used by the tenants until removed to the warehouses sometime between November 1 and December 15, 1967. No Government official or representative, orally or in writing, told any of the plaintiff's officials that the plaintiff could not continue its rental business or that it could not remove its personal property. Conversely, the plaintiff's officials were not told that they could continue its rental business or that it could remove its property.

The Army authorities did not use the master television antenna system; it was inoperative at all times pertinent to this action. It was physically located on telephone and electric light poles.

24. The equities of the two other Likins-Foster Wherry corporations were condemned at Biggs AFB, El Paso, Texas. Mr. T. Jack Foster had various communications, both written and oral, with the Air Force officials

concerned with the condemnation. A total of approximately $46,000 was paid for personal property related to this condemnation at Biggs AFB. The itemization of that personal property was described by Foster, for the Wherry corporations, as follows:

Bench Stock (Including 15%)	$23,660.51
Maintenance Equipment	4,779.00
Hand Tools	989.75
Warehouse Office Equipment	115.00
Office Equipment	7,031.50
Automotive Equipment	7,635.00
Other Equipment	2,673.00
	46,883.76

25. On January 15, 1958, Mr. Foster moved from his residence on the Fort Ord reservation. Several soldiers with inventories of the plaintiff's furniture used in that residence were present when he moved. The plaintiff's furniture which was in the apartment was not removed by Mr. Foster. There is no evidence that he either tried to remove it, or that he was prevented from removing it.

26. All of the plaintiff's property pertinent to this case is still in the Army's possession at Fort Ord. Nothing has been paid to the plaintiff for any of this property.

27. The plaintiff has failed to establish any fair market value for the rental of any or of all of its property.

28. The United States District Court for the Northern District of California entered a written pretrial order on January 13, 1960, which discussed all property taken by the condemnation order. The Court entered judgment on that date that all of the disputed personal property of the

two Wherry Corporations, L-F Ord and L-F Monterey, consisting of nine vehicles, spare parts, office furniture, *inter alia,* as set forth in the inventory prepared by the Government and by Likins-Foster representatives, had been taken, and the sum of $49,534.58 was awarded to the two Wherry corporations. On June 15, 1960, the United States District Court for the Northern District of California entered a judgment, after jury verdict, on the remaining issues in the condemnation action and therein found that the Complaint in Condemnation and the two Declarations of Taking did not describe any property or property rights of the plaintiff, and that the plaintiff had no interest in the property rights condemned. The plaintiff made an oral appearance at the trial through counsel, Roy C. Lytle.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and the petition is dismissed.